No. 11197.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. HAGEN, individually, and doing business as El Rey Cheese Co., JACK AROS and EVERETT HAGAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

APPELLANTS' OPENING BRIEF.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

STATUTES. PAGE

TEXTBOOKS.

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Statement Showing Jurisdiction.

Chester Bowles, Administrator of the Office of Price Administration, hereinafter called Appellee, brought this proceeding on behalf of the United States of America, pursuant to the provisions of Sections 205(a) and 202(e) of the Emergency Price Control Act of 1942. (Pub. L. 421, 77th Cong., 2nd Sess.; 56th Stat. 23; U. S. C. A., Title 50 App., Sections 901-946), as amended (Pub. L. 383, 78th Cong., 2nd Sess.; Pub. L. 108, 79th Cong., 1st Sess.) hereinafter called the "Act," for an order requiring Appellants, and each of them, to testify and produce certain documents described in the subpoenas *duces tecum,* more fully hereinafter set forth. [Tr. 2.]

On October 29, 1945, the court issued an Order requiring Appellants Jack Aros and Everett Hagan to testify and produce certain documents. [Tr. 35, 36, 37.] Said Order was entered and docketed October 29, 1945. [Tr. 37.]

Jurisdiction of this proceeding was conferred upon the District Court by Section 202(e) of the Act, it having been alleged that Appellants, and each of them, had failed and refused to appear for the purpose of testifying in response to said subpoenas, and further that said Appellants had failed and refused to produce any of the documents and records described in said subpoenas at the time and place designated therein. [Tr. 7.]

Notice of Appeal was filed by J. A. Hagan, Jack Aros, and Everett Hagan on October 31, 1945, and within thirty days from the making of said Order. [Tr. 37.]

The United States Circuit Court of Appeals has Appellate jurisdiction of the above Order by virtue of Section 128(a) of the Judicial Code as amended February 13, 1925, effective May 13, 1925 (43 Stat. L. 936, U. S C. A., Sec. 225).

Statement of the Case.

The within proceeding was brought by Appellee for an Order requiring Appellants to testify and produce certain documents described in the subpoenas referred to as "Exhibit A," directed to Appellants Everett Hagan, Jack Aros and El Rey Cheese Co., and purportedly issued by John O'Conor, Acting District Director of the Office of Price Administration [Tr. 10], and "Exhibit B" and "Exhibit C" directed to Jack Aros and Everett Hagan, respectively, purportedly issued by Chester Bowles as Administrator of the Office of Price Administration. [Tr. 11, 12, 13, 14.]

Appellee's petition, which was filed October 10, 1945, alleges that Appellant, J. A. Hagan, at all times mentioned therein was doing business as El Rey Cheese Co., and that Jack Aros was the bookkeeper, agent, employee and attorney-in-fact of said J. A. Hagan, and that Everett Hagan was the manager, agent and employee of the said J. A. Hagan [Tr. 2, 3]; that the said Appellants were and now are engaged in the business of selling at wholesale various types of cheeses subject to the provisions of Maximum Price Regulation 280, as amended, effective December 3, 1942 (7 F. R. 10144), Revised Maximum Price Regulation 289, as amended, effective May 17, 1944 (9 F. R. 5140), and the General Maximum Price Regulation (7 F. R. 3330) [Tr. 3]; that on or about May 24, 1945, Appellee deemed that an investigation was necessary to determine if there was evidence that Appellants had complied with the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23) as amended (Pub. L. 383, 78th Cong., 2d Sess.; Pub. L. 108, 79th Cong., 1st Sess.) hereinafter called the *"Act,"* and to assist in its administration and enforcement and the regulations thereunder; that in conducting said investigation Appellee deemed it necessary to inspect Appellants' records allegedly required to be kept under the provisions of Section 1351.812 of MPR 280, as amended (7 F. R. 10144), Section 1351.807 of Temporary MPR 22, as amended (7 F. R. 7914), and Section 5 of MPR 289, as amended (9 F. R. 5140), and the records of said company showing the prices paid and charged for certain cheeses bought and sold after the effective dates of said regulations. [Tr. 4, 5.]

Said petition further alleged that on June 9, 1945, a subpoena was signed and issued by John O'Conor, Acting

District Director of the Los Angeles District Office of the Office of Price Administration, which was allegedly served only upon Appellants Jack Aros and Everett Hagan, but not upon Appellant J. A. Hagan [Tr. 5, 6], to which Appellants Jack Aros and Everett Hagan failed to respond; that on August 2, 1945, a subpoena was purportedly signed and issued by Chester Bowles, as Administrator [Tr. 9], which was served only on said Appellants Jack Aros and Everett Hagan [Tr. 7], to which said Appellants failed to respond; that the testimony of said Appellants and all of said documents were and are relevant and material to the said investigation [Tr. 8], and that said documents are under the control of said Appellants Jack Aros and Everett Hagan. [Tr. 8.]

It appears from the affidavit of Merle B. Swan that the subpoenas purportedly signed by Chester Bowles [Exhibits "B" and "C"] were not served on Appellants Jack Aros and Everett Hagan until August 13, 1945, and that said subpoenas required said Appellants to appear in response thereto on August 16, 1945, at 9:00 a. m. of said day. [Tr. 15.]

Appellee prayed:

(1) For an order to show cause why an Order requiring Appellants to appear and testify and produce said documents should not issue, and

(2) That the Court issue its Order requiring Appellants to appear and testify and produce the documents described in said subpoenas. [Tr. 9.]

The court issued its Order to Show Cause on October 10, 1945 [Tr. 22, 23], requiring the Appellants and each of them to appear in the United States District Court on October 29, 1945 at 10:00 a. m., to show cause why

an Order should not issue requiring Appellants and each of them to appear before an officer of the Office of Price Administration to testify and produce the documents described in said subpoenas *duces tecum.*

Appellants Jack Aros and Everett Hagan had appeared specially through their attorney on the said August 16, 1945, for the purpose of quashing the issuance and service of said subpoenas. [Tr. 21, 22.]

Appellants on October 29, 1945, filed their reply to the said Order to Show Cause. [Tr. 26.] Said reply was supported by the affidavits of Jesus Aros, referred to in said subpoenas as Jack Aros [Tr. 26], and Everett Hagan [Tr. 31], denying upon information and belief the allegations of the petition and alleging affirmatively that said affiants were unable to ascertain the documents required to be produced [Tr. 27, 32], and that said documents were in the possession and under the control of J. A. Hagan, doing business as El Rey Cheese Co. [Tr. 30, 34.]

The questions involved, and which were raised in Appellants' Reply and upon the hearing of the Order to Show Cause, are as follows:

(1) The effect of the failure of the Appellee to produce evidence of materiality and relevancy of the testimony sought to be elicited and of the documents sought to be produced;

(2) The right of the Appellants to test the validity of the subpoenas upon the hearing of the Order to Show Cause before being subjected to contempt proceedings;

(3) The right of the Administrator to require employees to produce books of their employer;

(4) Whether the court was justified in holding that there had been no appearance in response to the said subpoenas;

(5) Whether the subpoenas described the documents sought to be produced with the definiteness and certainty required by law;

(6) Whether said subpoenas were reasonable, and

(7) Whether the rights of Appellants under the 4th and 5th Amendments of the Constitution of the United States were violated.

The court issued its Order dated October 29, 1945, directing Appellants Jack Aros and Everett Hagan to appear at the Los Angeles District Office of the Office of Price Administration, located at 1031 South Broadway, Los Angeles, California, before Eleanor Shur, Enforcement Attorney, at 10:00 a. m., on the first day of November, 1945, to testify and to produce all of the books, records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, and from June 15, 1944, to and including July 28, 1944, covering purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor Maid Gruyere Type Swiss Cheese. [Tr. 35, 36, 37.]

The said Order refers only to the subpoenas issued by Chester Bowles [Tr. 35], and makes no finding or order with reference to the subpoena issued by John O'Conor, referred to as Exhibit "A." [Tr. 10.] Therefore, it must be assumed that the Order purports to compel the Ap-

pellants to comply only with the subpoenas issued by Chester Bowles and referred to as Exhibits "B" and "C" [Tr. 11, 12, 13, 14], and that all questions with reference to the subpoena issued by the said John O'Conor have become moot.

Specifications of Error.

The court erred in the following particulars:

(1) In issuing its Order where there was no showing of relevancy or materiality of the documents sought to be produced.

(2) In not requiring the Appellee to produce evidence of the relevancy and materiality of the documents described in the subpoenas.

(3) In refusing to hear evidence as to the validity of the subpoenas.

(4) In not holding that the subpoenas were uncertain, indefinite and unreasonable.

(5) In holding that Appellants had failed and refused to appear and testify in response to said subpoenas.

(6) In refusing to require the service on J. A. Hagan of the subpoenas and Order to Show Cause before issuing its Order.

(7) In issuing its Order in violation of the 4th Amendment of the Constitution of the United States.

(8) In issuing its Order in violation of the 5th Amendment of the Constitution.

ARGUMENT.

I.

There Was No Showing of the Relevancy or Materiality of the Evidence or Documents Sought by the Subpoenas.

Nowhere in the petition or in the subpoenas do any facts appear showing the relevancy or materiality of the testimony or documents required by the subpoenas.

In his petition Appellee alleged solely that an investigation was deemed necessary to determine "if" there was evidence that Appellants had complied with the provisions of the Act. [Tr. 4.] As his conclusion, but without alleging any facts, Appellee then alleged in paragraph 5 of his petition, that it was necessary in conducting said investigation to obtain such information from certain records of Appellants. [Tr. 4, 5.] However, Appellee does not directly or even by implication allege that any violation had been committed by Appellants, nor does he show how or in what manner the said records are relevant or material to any investigation permitted by law, but rests his demand upon the sole ground that he deemed "an" investigation necessary to determine "if" there was evidence.

Upon the hearing of the Order to Show Cause counsel for Appellee volunteered the statement, unsupported by any evidence or proof, or any allegation in the petition, that in May information had been brought to the OPA that Appellants "were in violation of *'certain'* regulations covering the sale of cheese," without in any manner stating what the violation consisted of or what regulation was violated. [Tr. 42, 43.] (Emphasis ours.) This statement, in so far as Appellants can determine, is the

only inkling that appears that any violation by Appellants, if any, was even suspected, and even this statement is so vague and indefinite as not to have conveyed any meaning either to the court or counsel. It certainly did not seem sufficiently substantial to Appellee to make such an allegation in his petition or in said subpoenas.

In other words, Appellee has frankly conceded that he intended to conduct a general search and "fishing expedition." No ground was shown for supposing the documents called for contained evidence relevant to any inquiry, nor was there any statement, either in the petition or in the subpoenas, stating the subject of any inquiry.

In *United States v. Davis* (C. C. A. 2), 151 F. (2d) 140, it is stated:

> "We are very clear that to continue in a business after it has been regulated * * * does not expose a dealer to any general search."

In the case of *Goodyear Tire and Rubber Company v. National Labor Relations Board,* 122 F. (2d) 450, the Circuit Court of Appeals stated:

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. . . . We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable."

Again in *Bowles v. Beatrice Creamery Company* (C. C. A. 10), 146 F. (2d) 774, the Circuit Court of Appeals, in reviewing the requirements of an administrative subpoena, held:

> "There are cogent reasons why production and inspection should only be compelled by lawful process. Where the production is in response to lawful process, the owner of the books and papers is afforded protection by the limitations which the law imposes with respect to lawful process. Such process must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, and must limit its requirements to books and papers that are relevant to the inquiry. In other words, such process must confine its requirements within the limits which reason impose in the circumstances of the particular case. Moreover, the person to whom such process is addressed may challenge its legality before being compelled to respond thereto."

In the case of *Federal Trade Commission v. American Tobacco Company,* 264 U. S. 298, the court held as follows:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the

possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. * * * It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

The District Court of Tennessee in the case of *Bowles v. Cherokee Textile Mills et al.,* 61 F. Supp. 584, denied an order enforcing an Administrative subpoena, basing its decision on the *Goodyear Tire and Rubber Company* and the *American Tobacco Company* cases *(supra),* even though, as the court stated, the Emergency Price Control Act uses language broad enough to authorize the court to compel production of documents, etc., whether of evidential value or not.

Appellee, by way of recital in his petition and as his conclusion, referred to three regulations under which Appellant J. A. Hagan was required to keep records. [Tr. 5.] However, there was no direct allegation in said petition that the sales of the commodities involved, to wit, Swiss Gruyere Type Cheese or Taylor Maid Gruyere Type Swiss Cheese, came under the said regulations or any of them. Unless the said commodities came under said regulations, the records required to be kept thereunder were immaterial and irrelevant and, further, said Appellant was not required to keep such records.

Further, each of said regulations covers sales of a different commodity and requires different records, and Appellee was required to specify in his petition the regulation under which the records were required to be kept.

Before Appellee can require the production of records he must show that the Appellants' sales are subject to some regulation and that certain records are required to be kept under such regulation. Further, the court may not make an order enforcing a subpoena until it has ascertained that the Respondents' sales are subject to some regulation, and only then with respect to the records pertaining thereto.

A mere recital in Appellee's petition is insufficient to determine the relevancy of the records required to be produced where Appellee does not allege that Appellants' sales come within the provisions of a regulation.

Manifestly, the sales of the cheese referred to in the subpoenas do not come within the provisions of three regulations. Section 1351.812 of MPR 280, for instance, does not require the purchaser to keep records of purchases, while Section 5(b) of MPR 289 does require the purchaser of commodities coming within its provisions to preserve original invoices of such purchases.

Obviously, if the sales by Appellant J. A. Hagan come within the provisions of Section 1351.812 of MPR 280, documents required by said subpoenas covering *purchases* of the commodities described therein are immaterial and irrelevant.

II.

Where the Person Directed by an Administrative Subpoena to Produce Books, Papers or Documents Contends That Such Papers Are Not Relevant to the Investigation the Administrative Agency Must Produce Some Evidence of Relevancy or Materiality Before the Subpoena Will Be Enforced.

Petitioner alleged generally in paragraph 11 of his petition that all of the documents described in the subpoenas and required to be produced are now, and at the time of the issuance of said subpoenas, were relevant and material to said investigation, without any allegation as to how the said documents are or were relevant or material. [Tr. 7.] This allegation was denied by Appellants in paragraph III of their reply. [Tr. 25.]

Appellants also raised the question of the materiality and relevancy of the said documents before the court. [Tr. 47.] The court, however, refused to hear such evidence, stating that it would issue the Order [Tr. 46], and that the question of materiality would not be considered until Appellants were cited for contempt. [Tr. 48, 53, 54.] It would appear from the above proceedings that the court was of the opinion that the Administrator was the sole judge of the materiality and relevancy of the documents sought to be produced and that the court had no jurisdiction to review the administrative determination of said materiality or relevancy.

The issuance of an administrative subpoena does not require the District Court to issue an order enforcing

compliance therewith, but simply gives it jurisdiction to issue. The enforcement of the subpoena is confined to the discretion of the District Court which is to be judicially exercised. *Goodyear Tire and Rubber Company v. National Labor Relations Board (supra); Bowles v. Cherokee Textile Mills (supra); Hale v. Henkel,* 201 U. S. 43, 77.

In the case of an application to the court for an order enforcing a subpoena issued by the Administrator, the person to whom the order or subpoena is directed has full opportunity to test its validity. 42 *Am. Jur.* 419; *Goodyear Tire and Rubber Company v. National Labor Relations Board (supra).*

The validity or legality of an Administrator's subpoena may be challenged by the person to whom such process is addressed before being compelled to respond thereto. *Bowles v. Beatrice Creamery Co.,* 146 F. (2d) 774.

It was open to the Appellants to contend that the documents called for had no relation to the particular matter in question and this contention made in the answer raises an issue of fact for determination by the court *(Goodyear Tire and Rubber Company v. National Labor Relations Board (supra));* and before the aid sought by the Administrator will be granted, it must appear from the evidence that the papers, documents or evidence which are sought are material to a determination of the matter under investigation. *Goodyear Tire and Rubber Company v. National Labor Relations Board (supra); Federal Trade*

Commission v. American Tobacco Company (supra); Bowles v. Cherokee Textile Mills et al. (supra).

The general averment in paragraph 11 of the petition of the Administrator [Tr. 7], that the documents required to be produced are relevant and material to the said investigation, is not sufficient. *Dancell v. Goodyear Shoe Machinery Co.* (C. C., Mass.), 128 Fed. 753; 18 C. J. 1124, 1125. But the Administrator must allege the facts that will enable the court to determine that they are *prima facie* material and relevant. *United States v. Terminal Railway Assoc.,* 154 Fed. 268.

Further, the burden of proof is on the Administrator to prove the relevancy of the documents sought to be produced, but no attempt was made by the Administrator to discharge this burden. In the *Goodyear* case *(supra)* the respondent company claimed that a card index sought to be produced was irrelevant. The court stated as follows:

> "We think that with reference to the card index the rule laid down in the American Tobacco Company case also applies, that if the company's conclusion that this index is not relevant is not final, at least some evidence must be offered to show that it is wrong. *This evidence obviously * * * must be produced by the Board."* (Emphasis ours.)

We advert to the statement made by counsel for the Appellee as to her information concerning violations by Appellants [Tr. 42], and we wish to point out that the so-called investigation then pending was based solely on hearsay and suspicion. No complaint or proceeding was

then pending involving Appellants. In the case of *Federal Trade Commission v. American Tobacco Company (supra)* the court held:

> "The argument for the government attaches some force to the investigations and proceedings upon which the commission had entered. The investigations and complaints seem to have been *only on hearsay or suspicion;* but even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the 4th Amendment, or even to come so near to doing so as to raise a serious question of constitutional law. United States *ex rel.* Atty. Gen. v. Delaware & H. Co., 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527; United States v. Jin Fuey Moy, 241 U. S. 394, 401, 60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854." (Emphasis ours.)

Therefore, Appellants respectfully submit that the court abused its discretion:

(a) In refusing to consider any facts with reference to the legality and validity of the Administrator's subpoenas;

(b) In refusing to give Appellants a full opportunity to test the legality and validity of said subpoenas;

(c) In holding that the Appellants were obligated to respond to the Administrator's subpoenas before challenging their legality and validity;

(d) In not requiring the Appellee to produce evidence showing the materiality and relevancy of the documents sought to be produced.

III.

The Court Below Erred in Refusing to Hear Evidence as to the Validity of the Execution of the Subpoenas.

Appellants raised the question as to the validity and authenticity of the subpoenas at the time their counsel appeared specially before the District Office of the Office of Price Administration on August 16, 1945. [Tr. 21.] Appellants again raised this question in their Reply. [Tr. 24.]

No evidence was permitted by the court below for the purpose of testing the validity of said subpoenas.

In the case of an application to the court for an order enforcing a subpoena issued by the Administrator, the person to whom the order or subpoena is directed has full opportunity to test its validity. 42 *Am. Jur.* 419; *Goodyear Tire and Rubber Company v. National Labor Relations Board (supra).*

The validity or legality of an Administrator's subpoena may be challenged by the person to whom such process is addressed before being compelled to respondent thereto. *Bowles v. Beatrice Creamery Co.,* 146 F. (2d) 774.

IV.

That Said Subpoenas Were Uncertain, Indefinite and Unreasonable.

The subpoenas were general and sweeping in character and all-inclusive in their terms and could have described every book or document used in the business of Appellants whether the same applied to the transaction or transactions, if any, sought to be investigated or to transactions of said Appellants entirely irrelevant and immaterial thereto. How or in what manner the word "etc." could be interpreted or what books or documents referred to the purchases, sales and deliveries of the various types of cheese, or how any of the said books or documents referred to any investigation then in contemplation could not be ascertained. [Tr. 11, 12, 13, 14.]

It was not incumbent upon Appellants to speculate as to which records were required by Appellee, as the word "etc." could have covered not only sales records, but records of every description. Probably, if Appellee had divulged what investigation of Appellants was contemplated, they might have guessed what documents were sought, but no such disclosure was ever made.

Counsel for Appellee stated that the "sole purpose (of the Office of Price Administration) is to see the sales records of this company." [Tr. 57.] Therefore, the subpoenas should have been limited to such records naming them, but it is plainly apparent that the sole purpose of using the subpoenas was to conduct a fishing expedition with the hope of uncovering a violation.

To justify an order for the production and inspection of books or papers, the books or papers should be specified with reasonable certainty. 17 *Am. Jur.* 33; *Bowles v. Abendroth* (C. C. A. 9), 151 F. (2d) 407; *Bank of America etc. v. Douglas,* 105 F. (2d) 100; *Bowles v. Beatrice Creamery Co. (supra).*

V.

That the Court Erred in Holding That Appellants Had Failed to Answer and Appear at the Time and Place Called for in Said Subpoenas.

The court found that each of the said Appellants, Jack Aros and Everett Hagan, had failed and refused to appear and testify [Tr. 35] in response to the subpoenas duly issued by Chester Bowles.

Section 202(e) of the Act provides that the District Court shall have jurisdiction to issue an order requiring a person to appear and give testimony, and to appear and produce documents or both in case of contumacy by, or refusal to obey a subpoena served upon any such person.

There was no showing whatsoever of such contumacy or refusal on the part of the Appellants, but it affirmatively appears in the record that said Appellants appeared by their attorney for the purpose of resisting the subpoena upon legal and sufficient grounds. [Tr. 20, 21, 22.]

Therefore, the court had no jurisdiction to issue its Order herein appealed from in the absence of such showing of contumacy or refusal, and the court should have held that said Appellants had appeared at the time and place called for in said subpoenas and should have directed Appellee to issue legal and valid subpoenas obviating the defects of the subpoenas herein involved.

In view of the refusal of the court to consider the objections taken at the time that Appellants responded to the subpoenas and objected thereto, it was an abuse of discretion by the court not to have called for the introduction of evidence to determine whether the objections made by the said Appellants were valid or because of their contumacy or refusal to obey said subpoenas, and thereafter in its Order to have made proper findings or recitals of the facts found.

VI.

The Court Below Erred in Refusing to Require the Appellee to Prove Service of the Subpoenas and the Order to Show Cause Upon Appellant J. A. Hagan.

Appellee's petition alleged that J. A. Hagan was doing business as El Rey Cheese Company and that Jack Aros and Everett Hagan were the agents and employees of said J. A. Hagan. [Tr. 2, 3.]

The subpoenas involved herein were served only upon Jack Aros and Everett Hagan, but not upon the proprietor, J. A. Hagan. [Tr. 5, 6.]

No showing was made by the Appellee that either of the Appellants Jack Aros or Everett Hagan had under their custody or control the records sought to be produced, notwithstanding that each of them had filed an affidavit in response to the Order to Show Cause alleging that said documents were under the custody and control of Appellant J. A. Hagan. [Tr. 30, 34.]

No showing was made by the Appellee nor was there any allegation in the petition or Order to Show Cause that any attempt had been made to serve the said subpoenas on Appellant J. A. Hagan.

Counsel for the Appellee made the statement at the time of the hearing of the Order to Show Cause that the Appellant J. A. Hagan was in Arizona and that the records were under the management and control of the Appellants, Jack Aros and Everett Hagan [Tr. 45], without attempting to support these conclusions with any evidence.

VII.

The Subpoenas and the Order of the Court Below Constitute an Unreasonable Search and Seizure Contrary to the Fourth Amendment of the Constitution of the United States.

There was no claim by Appellee of specific wrongdoing of Appellants, nor was there any probable cause upon which to base any such claim. Any purported investigation which might have been in progress, and concerning which Appellants were entirely ignorant, was based on mere speculation of Appellee. Nowhere in the record do there appear any facts upon which Appellee could base any suspicion nor does Appellee allege that he suspects any such wrongdoing. Before the court could issue the Order here involved it was incumbent upon the court to determine whether there was evidence of such wrongdoing or probable cause and, if so, that the documents sought were relevant and material, which the court failed to do.

The courts have held that records required to be kept by law are quasi public in character but nowhere does it appear that such records may be inspected without service of process upon the owner thereof. The court did not inquire into the custody and control of said documents although this issue was raised in the pleadings and upon the hearing of the Order to Show Cause.

In the case of *Bowles v. Northwest Poultry & Dairy Products Company,* 153 F. (2d) 32, decided on January 15, 1946, by this court, the court applied the presumption of regularity attending acts of administrative agencies in deeming the mere issuance of an inspection requirement by the Administrator sufficient to show the necessity or propriety thereof to aid in the administration and enforcement of the Act and that by reason of such presumption

assumed that the Administrator did not act oppressively or undertake to pursue investigations where no need therefor was apparent. However, as the court stated, Appellee therein failed either to rebut or overcome this presumption as its *resistance to the application for inspection was based solely on the ground of the alleged invalidity of the regulation.* (Emphasis ours.)

In the case at bar the Appellants have raised questions as to the invalidity of the subpoenas involved and the right of Appellants to test the same, the failure of Appellee to introduce any proof as to the custody and control of the records sought, the relevancy and materiality of the documents required, and other grounds set forth in the within brief.

As the court below failed and refused to consider the points raised by Appellants, the Order herein involved is definitely oppressive and unreasonable and constitutes an unreasonable search and seizure contrary to the Fourth Amendment of the Constitution of the United States. *Veeder v. U. S.,* 252 Fed. 418; *U. S. v. Baumert,* 179 Fed. 737; *U. S. v. Premises in Butte,* 246 Fed. 186; *U. S. v. Pittoto,* 267 Fed. 604; *U. S. v. Rykowski,* 267 Fed. 868; *U. S. v. Kelik,* 272 Fed. 488; *Mobile Gas Co. v. Patterson,* 288 Fed. 889; *U. S. v. Micholski,* 265 Fed. 839.

Appellants have cited numerous authorities under appropriate headings in the within brief showing that the mere conclusion by the Administrator that the inspection of documents was necessary to the enforcement and administration of the Act is insufficient to overcome the guarantees under the Constitution saved to its citizens in all cases where such issues are raised. That these issues were properly and particularly raised at every stage of the within proceeding must be conceded and no presumption may be indulged in to deny to Appellants their constitutional guarantees.

VIII.

The Subpoenas and the Order of the Court Below Violated Appellants' Right Against Self-Incrimination Contrary to the Fifth Amendment of the Constitution of the United States.

The Appellants, Jack Aros and Everett Hagan, were not doing business under the regulations involved herein. They were not officers of a corporation and no proof was introduced by Appellee showing the extent of their authority, if any, to represent J. A. Hagan, who concededly was never served with any process.

Further, the subpoenas required said Appellants to give evidence *viva voce.*

Appellants Jack Aros and Everett Hagan may not violate the constitutional rights of J. A. Hagan by producing records which, in so far as the evidence shows, are not in their custody or control and concerning which they have no knowledge.

Appellee did not attempt to introduce any evidence as to the identity of any records over which said Appellants had control, if any, or whether said Appellants had any knowledge of their location or contents. In so far as the evidence is concerned, said Appellants might have been janitors.

The pleadings raised this issue and it was also brought to the attention of the court below on the hearing of the Order to Show Cause. [Tr. 30, 34, 44, 45.]

It is obvious from the petition that J. A. Hagan is the person doing business under the OPA regulations and he is the one who has the duty of keeping records and permitting inspection. Said J. A. Hagan never has been served. Only said J. A. Hagan can waive his right against self-incrimination by consenting to do business

under the regulations issued by the Office of Price Administration. Appellants Everett Hagan and Jack Aros are merely employees and are not licensed to do business by the Administrator and, therefore, the records are not, in so far as they are concerned, quasi public records. *Bowles v. Amato,* 60 F. Supp. 361; *U. S. v. Davis* (C. C. A. 2d), 114 N. Y. L. J. 471; *Bowles v. Trowbridge* (D. C., Cal., 4-6-45), 60 F. Supp. 48.

Therefore, the subpoenas and the Order of the court below violated the rights of Appellants against self-incrimination in violation of the Fifth Amendment of the Constitution of the United States.

Conclusion.

Appellants respectfully submit that the court below erred in issuing its Order requiring the Appellants to testify and produce the documents described in the subpoenas for the following reasons:

(1) The court did not require jurisdiction of J. A. Hagan who was the only one of the Appellants subject to the provisions of the Emergency Price Control Act;

(2) The Appellants, Jack Aros and Everett Hagan, were merely employees, were not subject to the provisions of the Act, and therefore were not the custodians or in control of the records of their employer;

(3) The question of validity of the subpoenas was raised by Appellants at all stages of the proceeding but the court below did not at any time consider this question;

(4) The demand of Appellee that Appellants appear on a legal holiday without proper or sufficient notice was unreasonable and the court should have so held and should have quashed said subpoenas;

(5) The court refused to entertain the question of the relevancy and materiality of the documents sought to be produced although the question was raised at every stage of the proceedings;

(6) The court below at no time considered any of the issues raised in Appellants' responsive pleadings and affidavits, and based its Order on vague and indefinite conclusions and observations of Appellee's attorney;

(7) The court had no jurisdiction to issue its Order as there was no evidence of contumacy, failure, or refusal by Appellants to comply with the subpoenas, and the recital of such failure or refusal is not based upon any evidence;

(8) The constitutional rights of Appellants were violated.

Appellants are aware of the necessity of enforcing the regulations issued by the Administrator, but respectfully submit that there is a corresponding duty on the part of the Administrator to perform his functions in the manner provided by law and supported by a long and consistent line of decisions rendered by distinguished and learned jurists.

The Federal courts, in approaching the judicial problems of enforcement of the Act with a clear vision, should

not permit their vision to be dimmed with respect to the constitutional guaranties of those subject to its provisions.

The chipping away of constitutional safeguards and the gradual abrogation of rights guaranteed under the Fourth and Fifth Amendments of the Constitution may well lead to a breakdown of precedent established over the entire history of our jurisprudence, and where the right to rely upon such guarantees is raised, those guarantees should be as jealously guarded as the rights of those enforcing the laws.

Respectfully submitted,

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